For parity measurement results that are expressed as percentages or proportions:

Step 1:

$$\rho = \frac{(n_{ILEC}P_{ILEC} + n_{CLEC}P_{CLEC})}{n_{ILEC} + n_{CLEC}}$$

Step 2:

$$\sigma_{PILEC-PCLEC} = \text{sqrt}[[\rho(1-\rho)]/n_{ILEC} + [\rho(1-\rho)]/n_{CLEC}]$$

Step 3:

$$Z = (P_{ILEC} - P_{CLEC})/\sigma_{PILEC-PCLEC}$$

Where: n = Number of Observations
P = Percentage or Proportion

- For benchmark measurement results that are expressed as percentages or proportions:

$$Z = (\text{benchmark} - P_{CLEC})/1$$

Where: n = Number of Observations
P_{clec} = Percentage or Proportion for CLEC

- For measurement results that are expressed as rates or a ratio:

$$z = (DIFF) / \delta_{DIFF}$$

Where;
$DIFF = R_{ILEC} - R_{CLEC}$
$R_{ILEC} = num_{ILEC}/denom_{ILEC}$
$R_{CLEC} = num_{CLEC}/denom_{CLEC}$
$\delta_{DIFF} = SQRT\ [R_{ILEC}\ (1/denom_{CLEC} + 1/\ denom_{ILEC})]$

II. Qualifications To Use Z-Test:

- The proposed Z-tests are applicable to reported measurements that contain 30 or more data points.

- For measurements where the performance delivered to CLEC is compared to SWBT performance and for which the number of data points are 29 or less, The following

Alternative may be used:

Alternative 1:

1. For measurements that are expressed as averages, performance delivered to a CLEC for each observation shall not exceed the ILEC averages plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC average plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for sample sizes 30 or greater or the permutation test to provide evidence of parity. If SWBT uses the Z-test for samples under 30, the CLEC can independently perform the permutation test to validate SWBT's results.

2. For measurements that are expressed as percentages, the percentage for CLEC shall not exceed ILEC percentage plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC percentage plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for sample sizes 30 or greater or the permutation test to provide evidence of parity. If SWBT uses the Z-test for samples under 30, the CLEC can independently perform the permutation test to validate SWBT's results.

Alternative 2:

Permutation analysis will be applied to calculate the z-statistic using the following logic:

1. Choose a sufficiently large number T.
2. Pool and mix the CLEC and ILEC data sets
3. Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set (n_{CLEC}) and one reflecting the remaining data points, (which is equal to the size of the original ILEC data set or n_{ILEC}).
4. Compute and store the Z-test score (Z_S) for this sample.
5. Repeat steps 3 and 4 for the remaining T-1 sample pairs to be analyzed. (If the number of possibilities is less than 1 million, include a programmatic check to prevent drawing the same pair of samples more than once).
6. Order the Z_S results computed and stored in step 4 from lowest to highest.
7. Compute the Z-test score for the original two data sets and find its rank in the ordering determined in step 6.
8. Repeat the steps 2-7 ten times and combine the results to determine P = (Summation of ranks in each of the 10 runs divided by 10T)
9. Using a cumulative standard normal distribution table, find the value Z_A such that the probability (or cumulative area under the standard normal curve) is equal to P calculated in step 8.
10. Compare Z_A with the desired critical value as determined from the critical Z table. If $Z_A >$ the designated critical Z-value in the table, then the performance is non-compliant.

III. Critical Z-Test Value

The following table will be used for determining the Critical Z-value for each measurement. The table can be extended to include CLECs with fewer performance measurements.

Critical Z - Statistic Table

Number of Performance Measurements	Critical Z-value
10-19	1.79
20-29	1.73
30-39	1.68
40-49	1.81
50-59	1.75
60-69	1.7
70 –79	1.68
80 – 89	1.74
90 – 99	1.71
100 – 109	1.68
110 –119	1.7
120 – 139	1.72
140 – 159	1.68
160 – 179	1.69
180 – 199	1.7
200 – 249	1.7
250 – 299	1.7
300 – 399	1.7
400 – 499	1.7
500 – 599	1.72
600 – 699	1.72
700 – 799	1.73
800 – 899	1.75
900 – 999	1.77
1000 and above	Calculated for Type-1 Error Probability of 5%

IV. Methods Of Calculating Per Occurrence Voluntary Payments

Measurements For Which The Reporting Dimensions Are Averages Or Means.

Step 1: Calculate the average or the mean for the measurement for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measurement. (For benchmark measurements, substitute the benchmark value for the value calculated in the preceding sentences).

Step 2: Calculate the percentage difference between the actual average and the calculated average for the third consecutive month.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step. Calculate the average for three months and multiply the result by $1500, $900, and $600 for Measurements that are designated as High, Medium, and Low respectively; to determine the applicable assessment payable to the U.S. Treasury for that measure.

Measurements For Which The Reporting Dimensions Are Percentages.

Step 1: Calculate the percentage for the measurement for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, substitute the benchmark value for the value calculated in the preceding sentences).

Step 2: Calculate the difference between the actual percentage for the CLEC and the calculated percentage for each of the three non-compliant months.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step. Calculate the average for three months and multiply the result by $1500, $900, and $600 for measurements that are designated High, Medium, and Low respectively: to determine the applicable assessment payable to the U.S. Treasury.

Measurements For Which The Reporting Dimensions Are Ratios Or Proportions.

Step 1: Calculate the ratio for the measurement for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measurements, substitute the benchmark value for the value calculated in the preceding sentences).

Step 2: Calculate the percentage difference between the actual ratio for the CLEC and the calculated ratio for each month of the non-compliant three-month period.

Step 3: Multiply the total number of service orders by the percentage calculated in the previous step for each month. Calculate the average for three months and multiply the result by $1500, $900, and $600 for measurements that are designated as High, Medium, and Low respectively; to determine the applicable assessment for that measure.

Measurements for Which Payment Is Per Occurrence With A Cap

Voluntary payments are calculated on a per occurrence basis in accordance with the methodologies described above and are payable up to the caps identified in Attachment A-4.

V. Methods Of Calculating Per Measurement Voluntary Payments

Per measurement voluntary payments are payable as detailed in the Voluntary Payments Table below if the actual Z-value exceeds the critical Z-value.

ATTACHMENT A-4

VOLUNTARY PAYMENTS TABLE FOR MEASUREMENTS

Per Occurrence

Measurement Group	
High	$1500
Medium	$900
Low	$600

Per Measurement/Per Occurrence Caps

Measurement Group	
High	$225,000
Medium	$90,000
Low	$60,000

ATTACHMENT A-5a

SBC/AMERITECH MEASUREMENT LIST
(EXCEPT CALIFORNIA AND NEVADA)

MEASUREMENT LIST (EXCEPT CALIFORNIA AND NEVADA)							
	FPP	Benchmark /Parity	Measurement Name				Pay
				Y1	Y2	Y3	
OSS	1	B	% FOC received in 'X' hours	M	M	M	occur/cap
	2	B	Average Response Time for OSS preorder interfaces	M	M	M	occur/cap
	3	P	Order Process Percent Flow Through	H	H	H	occur/cap
Provisioning	4a	P	% SBC caused missed due dates - POTS	H	H	H	occur
	4b	P	% SWBT caused missed due dates - Design	H	H	H	occur
	4c	P	% SWBT caused missed due dates	H	H	H	occur
	4d	B	% Mechanized Completions Returned Within one Day Of Work Completion	L	L	L	occur
	5a	P	Percent Trouble Report Within 10 Days (I-10) of Installation – POTS	H	H	H	occur
	5b	P	Percent Installation Reports (Trouble Reports) Within 30 Days (I-30) of Installation - Design	H	H	H	occur
	5c	P	Percent Installation Reports (Trouble Reports) Within 30 Days (I-30) of Installation - UNE	H	H	H	occur
	6a	P	Mean Installation Interval - POTS	H	H	H	occur
	6b	P	Average Installation Interval - POTS	H	H	H	occur
	6c	B	% Installation completed in 'X' days - UNE	M	H	H	occur
	7a	P	Average Delay Days For SWBT Caused Missed Due Dates – POTS	L	L	L	occur
	7b	P	Average Delay Days For SWBT Caused Missed Due Dates – Design	L	L	L	occur
	7c	P	Average Delay Days For SWBT Caused Missed Due Dates – UNE	L	L	L	occur
	8	P	Average installation interval - DSL	H	H	H	occur
	9	P	Average response time for loop qualification information	M	M	M	occur
Maintenance	10a	P	Percent Missed Repair Commitments - POTS	H	H	H	occur
	10b	P	Percent Missed Repair Commitments - UNE	H	H	H	occur
	11a	P	Percent Repeat Reports - POTS	H	H	H	occur
	11b	P	Percent Repeat Reports - Design	H	H	H	occur
	11c	P	Percent Repeat Reports - UNE	H	H	H	occur
	12a	P	Receipt To Clear Duration - POTS	H	H	H	occur
	12b	P	Mean Time To Restore - Design	H	H	H	occur
	12c	P	Mean Time To Restore - UNE	H	H	H	occur
	13a	P	Trouble Report Rate - POTS	H	H	H	occur
	13b	P	Failure Frequency – Design	L	L	L	occur
	13c	P	Trouble Report Rate - UNE	H	H	H	occur
Interconnection	14	B	Average Trunk Restoration Interval for Service Affecting Trunk Groups	M	M	H	occur
	15	B	Percent Trunk Blockage	M	H	H	occur/cap
Local Number Portability	16	B	% Pre-mature Disconnects (Coordinated Cutovers)	M	M	H	occur
Collocation	17	B	% missed collocation due date	M	M	H	occur
Billing	18	B	Billing Timeliness	M	M	H	occur/cap
OSS	19	B	OSS Interface Availability	M	M	H	meas

Interconnection	20	B	Common Transport Trunk Blockage	M	M	H	meas

ATTACHMENT A-5b

SBC/AMERITECH MEASUREMENT LIST
(CALIFORNIA AND NEVADA)

MEASUREMENT LIST (CALIFORNIA AND NEVADA)							
	FPP	Benchmark / Parity	Measurement Name				Pay
				Y1	Y2	Y3	
OSS	1	B	Average FOC Notice Interval	M	M	M	occur/cap
	2	B/P	Average Response Time (to preorder queries)	M	M	M	occur/cap
	3	B	Percent of Flow Through Orders	H	H	H	occur/cap
Provisioning	4a	P	% of Due Dates Missed- POTS	H	H	H	occur
	4b	P	% of Due Dates Missed – Design	H	H	H	occur
	4c	P	% of Due Dates missed – UNE	H	H	H	occur
	4d	B	Average Completion Notice Interval	L	L	L	occur
	5a	P	Percent Troubles Within 30 Days for New Orders - POTS	H	H	H	occur
	5b	P	Percent Troubles Within 30 Days for New Orders - Design	H	H	H	occur
	5c	P	Percent Troubles Within 30 Days for New Orders - UNE	H	H	H	occur
	6a	P	Average Completed Interval - POTS	H	H	H	occur
	6b	P	Average Completed Interval - Design	H	H	H	occur
	6c	P	Percent Installation completed within Standard Interval – UNE	M	H	H	occur
	7a	P	Delay Order Interval to Completion Date - POTS	L	L	L	occur
	7b	P	Delay Order Interval to Completion Date - Design	L	L	L	occur
	7c	P	Delay Order Interval to Completion Date - UNE	L	L	L	occur
	8	P	Average Completed Interval - DSL	H	H	H	occur
	9	P	Average response time for loop makeup information	M	M	M	occur
Maintenance	10a	P	Percent of Cust. Trouble not Resolved in Est. Time - POTS	H	H	H	occur
	10b	P	Percent of Cust. Trouble not Resolved in Est. Time - UNE	H	H	H	occur
	11a	P	Frequency of Repeat Troubles in 30 day period-POTS	H	H	H	occur
	11b	P	Frequency of Repeat Troubles in 30 day period-Design	H	H	H	occur
	11c	P	Frequency of Repeat Troubles in 30 day period - UNE	H	H	H	occur
	12a	P	Average Time to Restore – POTS	H	H	H	occur
	12b	P	Average Time To Restore – Design	H	H	H	occur
	12c	P	Average Time To Restore – UNE	H	H	H	occur
	13a	P	Customer Trouble Report Rate - POTS	H	H	H	occur
	13b	P	Customer Trouble Report Rate - Design	L	L	L	occur
	13c	P	Customer Trouble Report Rate - UNE	H	H	H	occur
Interconnection	14	B	Avg. Trunk Restoration Interval for Service Affecting Trunk Groups	M	M	H	occur
	15	P	Percent Blocking on Interconnection Trunks	M	H	H	occur/cap
Coordinated Conversions	16	P	Coordinated Customer Conversions	M	M	H	occur
Collocation	17	B	Percent Missed Collocation Due Dates	M	M	H	occur
Billing	18	B	Wholesale Bill Timeliness	M	M	H	occur/cap
OSS	19	B	Percent of Time Interface is Available	M	M	H	meas
Interconnection	20	B	Percent Blocking on Common Trunks	M	M	H	meas

ATTACHMENT A-6

YEAR 1

CAPS ($M)

State	Annual	Monthly
Arkansas	$ 4.16	$ 0.35
California	$ 79.01	$ 6.58
Connecticut	$ 9.56	$ 0.80
Illinois	$ 30.41	$ 2.53
Indiana	$ 9.71	$ 0.81
Kansas	$ 5.89	$ 0.49
Michigan	$ 23.55	$ 1.96
Missouri	$ 10.87	$ 0.91
Nevada	$ 1.54	$ 0.13
Ohio	$ 17.81	$ 1.48
Oklahoma	$ 7.05	$ 0.59
Texas	$ 40.99	$ 3.41
Wisconsin	$ 9.45	$ 0.79
	$250.00	$ 20.83

ATTACHMENT A-6 (cont'd)

YEAR 2

CAPS ($M)

State	Annual	Monthly
Arkansas	$ 6.24	$ 0.52
California	$ 118.51	$ 9.88
Connecticut	$ 14.34	$ 1.20
Illinois	$ 45.62	$ 3.80
Indiana	$ 14.57	$ 1.21
Kansas	$ 8.83	$ 0.74
Michigan	$ 35.32	$ 2.94
Missouri	$ 16.31	$ 1.36
Nevada	$ 2.31	$ 0.19
Ohio	$ 26.72	$ 2.23
Oklahoma	$ 10.57	$ 0.88
Texas	$ 61.48	$ 5.12
Wisconsin	$ 14.18	$ 1.18
	$ 375.00	$ 31.25

YEAR 3

CAPS ($M)

State	Annual	Monthly
Arkansas	$ 8.32	$ 0.69
California	$ 158.02	$ 13.17
Connecticut	$ 19.12	$ 1.59
Illinois	$ 60.82	$ 5.07
Indiana	$ 19.42	$ 1.62
Kansas	$ 11.78	$ 0.98
Michigan	$ 47.10	$ 3.93
Missouri	$ 21.75	$ 1.81
Nevada	$ 3.08	$ 0.26
Ohio	$ 35.62	$ 2.97
Oklahoma	$ 14.10	$ 1.18
Texas	$ 81.97	$ 6.83
Wisconsin	$ 18.90	$ 1.57
	$ 500.00	$ 41.67

ATTACHMENT B

MODEL COLLOCATION ATTESTATION REPORT

DRAFT

Independent Accountant's Report

SBC Communications Inc. Board of Directors
and
Federal Communications Commission

We have examined SBC Communications Inc.'s (the Company) assertion that the Company has policies and procedures (as described in the attachment) in place as of Month xx, 1999 regarding compliance with the Federal Communications Commission's (FCC) collocation requirements. The FCC's collocation requirements are contained in the FCC's March 31, 1999 First Report and Order and Further Notice of Proposed Rulemaking on Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147). The Company is responsible for the design, distribution and monitoring of such policies and procedures in place upon which the Company's assertion to the FCC is based.

Our examination was made in accordance with standards established by the American Institute of Certified Public Accountants and included both a determination of the existence and distribution of such policies and procedures upon which the Company's assertion is based, as well as such other procedures as we considered necessary in the circumstances. We believe that our examination provides a reasonable basis for our opinion.

In our opinion, management's assertion that policies and procedures as described above are in place as of Month xx, 1999 is fairly stated in all material respects.

This report is intended solely for the information and use of the Board of Directors and management of the Company and the FCC and should not be used for any other purpose. Since this report will be filed in documents that are a part of the public record, its distribution is not limited.

_____
Signature of Independent Auditor

_____
Date

ATTACHMENT C

PROMOTIONAL DISCOUNTS FOR RESIDENTIAL UNBUNDLED LOCAL LOOPS

ANALOG 2-WIRE LOOPS

Promotional Loop Discounts			
Zone	**Current Price**	**New Price**	**Discount (%)**
Arkansas			
Zone 1	$56.25	$23.50	58.22
Zone 2	$19.00	$14.80	22.11
Zone 3	$14.00	$11.60	17.14
			Average: 25.01
California			
Zone 1 (Statewide)	$12.92	$9.69	25.00
			Average: 25.00
Connecticut			
Zone A	$9.34	$7.25	22.38
Zone B	$14.77	$12.75	13.68
Zone C	$17.08	$12.75	25.35
Zone D	$19.71	$12.75	35.31
			Average: 25.03
Illinois			
Zone A	$2.59	$2.59	0.00
Zone B	$7.07	$5.63	20.37
Zone C	$11.40	$8.17	28.33
			Average: 25.03
Indiana			
Zone 1	$8.03	$6.23	22.42
Zone 2	$8.15	$6.23	23.56
Zone 3	$8.99	$6.23	30.70
			Average: 25.06
Kansas			
Zone 1	$70.30	$21.40	69.56
Zone 2	$26.55	$17.50	34.09
Zone 3	$19.65	$17.50	10.94
			Average: 25.00

Michigan			
Zone A	$9.43	$8.12	13.89
Zone B	$12.02	$8.85	26.37
Zone C	$14.86	$10.40	30.01
		Average:	**25.02**
Missouri			
Zone 1	$12.71	$11.00	13.45
Zone 2	$20.71	$15.00	27.57
Zone 3	$33.29	$13.25	60.20
Zone 4	$18.23	$9.20	49.53
		Average:	**25.40**
Nevada			
Zone 1	$11.33	$9.75	13.95
Zone 2	$18.25	$11.85	35.07
Zone 3	$34.75	$12.75	63.31
		Average:	**25.00**
Ohio			
Zone B	$5.93	$5.34	9.95
Zone C	$7.97	$5.34	33.00
Zone D	$9.52	$5.34	43.91
		Average:	**35.94**
Oklahoma			
Zone A	$35.00	$16.20	53.71
Zone B	$18.00	$13.00	27.78
Zone C	$13.00	$11.50	11.54
		Average:	**25.01**
Texas			
Zone 1	$18.98	$10.60	44.15
Zone 2	$13.65	$10.60	22.34
Zone 3	$12.14	$10.55	13.10
		Average:	**25.01**
Wisconsin			
Zone 1	$10.90	$8.17	25.05
Zone 2	$10.90	$8.17	25.05
Zone 3	$10.90	$8.17	25.05
		Average:	**25.05**

ATTACHMENT D

ALTERNATIVE DISPUTE MEDIATION

SBC/Ameritech shall implement in the SBC and Ameritech States a voluntary alternative dispute mediation process to resolve local service carrier-to-carrier disputes, including disputes related to interconnection agreements, as follows:

If resolution is not attained upon completion of the dispute resolution process contained in a state commission-approved interconnection agreement, or if the dispute is not subject to resolution under an interconnection agreement, SBC/Ameritech shall, at the option of the other party or parties to the dispute, participate in a mediation process as follows:

a. If a party voluntarily chooses to invoke these mediation procedures, it shall submit a written request for mediation to the appropriate state commission, with a copy to SBC/Ameritech and any other party or parties involved in the dispute. State commissions shall not be required to implement this process or to mediate disputes under the mediation provisions of this Attachment.

b. The written request shall include a statement as to whether the dispute affects service or is otherwise exceptionally time-sensitive. If the dispute affects service or is otherwise exceptionally time-sensitive, the written request shall set forth time requirements for resolution, and the time frames stated herein shall be shortened by agreement of the parties to accommodate the requested time requirements, which may not be less than 3 business days.

c. SBC/Ameritech shall attempt to resolve issues affecting multiple CLECs in the same State through consolidated mediations.

d. The parties to the dispute shall each have a person or persons of authority at the dispute resolution table such that a reasonable resolution could be agreed to at the table. In the event the representative(s) of a party come without the authority to agree to a particular item, that party shall commit to provide a response within no more than 2 business days.

e. Any information shared with another party or parties prior to a mediation session shall be faxed to the other party or parties to the dispute at least 24 hours prior to the next mediation session. A copy shall also be provided to the staff of the appropriate state commission.

f. SBC/Ameritech shall have one contact person for all contacts related to a given dispute.

g. SBC/Ameritech shall attend a face-to-face meeting with the disputing party or parties and the staff of the appropriate state commission within one week of the request for mediation. In the event it is not possible to resolve the issue in one session, the

parties to the dispute shall agree to a meeting schedule and have all relevant decision makers meet with the other party or parties during the scheduled times.

h. SBC/Ameritech agrees that service to end-user customers shall not be disrupted or otherwise affected by the pendency of a mediation proceeding.

i. SBC/Ameritech shall prohibit their regulatory, legal, and/or wholesale personnel from disclosing to their retail staff information regarding customers identified during the mediation process concerning the dispute being mediated. If necessary, SBC/Ameritech regulatory, legal, and/or wholesale personnel may contact the customer regarding service or billing-related issues after they have first notified the opposing party or parties in mediation to discuss the need for such contact and to give such party or parties the opportunity to participate in such contact.

j. SBC/Ameritech shall reduce each resolved issue to writing within 5 business days of the resolution. One of the other parties may also agree to reduce the agreement to writing. All subsequent responses/replies shall be due within 3 business days. If the parties have not reduced the resolved issue to an agreed-upon writing within 14 calendar days of the issue's resolution, they shall notify the staff of the appropriate state commission within 5 business days, and any party may request to resume the mediation. Written resolutions of the issues, once agreed upon by the parties, shall be binding upon the parties; a copy of each agreement shall be submitted to the staff of the appropriate state commission upon execution. If an agreement reached requires an amendment or addendum to a previously approved interconnection agreement, SBC/Ameritech shall file the amendment or addendum for approval by the appropriate state commission within 14 calendar days of reaching the written agreement.

k. Communications during the mediation process shall be confidential. SBC/Ameritech shall facilitate the confidentiality of the mediation process, including execution of a reasonable mediation agreement (provided that the other mediating party also agrees to do so as a condition to participating in the mediation process).

Once issues are resolved by the parties, should another telecommunications carrier in the same State request resolution of the same issue(s), with substantially similar factual circumstances and terms, and with conditions and other contract provisions that are not materially different, SBC/Ameritech shall make the arrangements arrived at through a prior mediation process available to that telecommunications carrier.

Should the appropriate state commission choose not to participate in the mediation process, the parties may mutually agree that a party (not a party to the dispute) may fill the role of the state commission and its staff in the mediation process.

ATTACHMENT E

POTENTIAL OUT-OF-TERRITORY MARKETS

Albany, NY
Albuquerque, NM
Atlanta, GA
Baltimore, MD
Baton Rouge, LA
Birmingham, AL
Boston, MA
Boulder, CO
Buffalo, NY
Cedar Rapids, IA
Charlotte, NC
Cincinnati, OH
Colorado Springs, CO
Denver, CO
Des Moines, IA
Fort Lauderdale, FL
Greensboro, NC
Greenville, SC
Harrisburg, PA
Honolulu, HI
Jacksonville, FL
Las Vegas, NV
Louisville, KY
Memphis, TN
Miami, FL
Middlesex, NJ
Minneapolis-St. Paul, MN
Nashville, TN
Nassau, NY
New Orleans, LA
New York , NY
Newark, NJ
Norfolk, VA
Orlando, FL
Passaic, NJ
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
Portland, OR

Raleigh, NC
Richmond, VA
Rochester, NY
Salt Lake City, UT
Seattle, WA
Syracuse, NY
Tampa, FL
Tucson, AZ
Washington, DC
West Palm Beach, FL
Wilmington, DE

Separate Statement
of
Commissioner Susan Ness

Re: *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141.*

Today we approve a merger of two of the largest incumbent telephone companies in the United States. Combined, this new company will comprise approximately one third of the total local access lines in the country. Although a merger of this size is no minor event, when viewed more broadly, it is but one part of a larger global restructuring of the telecommunications industry. Congress changed the landscape of the telecommunications industry when it passed the Telecommunications Act of 1996. Now companies are aligning, merging, expanding, contracting and splitting into pieces to position themselves better on the global battlefield. Our challenge is to ensure that the emerging marketplace is conducive to local competition, as envisioned by the Act.

Absent conditions, the record is compelling that the combination of SBC and Ameritech would not serve the public interest; it would delay rather than hasten local competition. I particularly lament the loss of a large, incumbent local exchange company for benchmarking purposes. Ameritech has also contributed to competition in the multichannel video marketplace through its successful cable overbuilds. I hope that SBC will continue to pursue that strategy aggressively.

While I agree with my colleagues that, on balance, the merger conditions tip the scale in favor of approval of the merger, they are no panacea. The potential for diminution of local competition in the SBC/Ameritech states remains. Whether these conditions are successful will depend in large measure on the good faith efforts of the merged companies to meet both the letter and the spirit of the requirements. SBC has assured the Commission that it intends to do so, and I rely heavily on these representations. The Commission will be watching closely.

The communications landscape is reconfiguring at an astonishing speed. In approving this merger, the Commission has made every effort to ensure that the American consumer reaps the benefit of a competitive marketplace.

SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH
CONCURRING IN PART, DISSENTING IN PART

Re: *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141.

By this Order, the Commission imposes legally dubious, overbroad, potentially unenforceable, privately negotiated conditions on a merger that it is statutorily unauthorized to review, and assessment of which was governed by no clear procedural or substantive standards. The item itself is the end-result of an extraordinarily elaborate procedural approach to the review of license transfers that is entirely *sui generis* -- that is, never before applied and unlikely ever again to be followed; such a process raises an unfortunate appearance of disparate and unfair treatment of these applicants for license transfers.

Accordingly, I concur only in the narrow decision to grant SBC and Ameritech authorization to transfer lines pursuant to section 214 and licenses pursuant to section 310(d). I cannot support the reasoning of the Order and must dissent in full from the adoption of the conditions on these license and authorization transfers.

I. The Conditions Are Inconsistent With The Communications Act

The conditions imposed in this Order are, in my opinion, of highly questionable legal validity. In particular, many of the conditions are inconsistent with specific sections of the Communications Act.

To be sure, the Communications Act grants the Commission authority to condition license transfer and section 214 authorizations. This authority is *not* without its limits, however. Rather, section 303(r) provides that "except as otherwise provided in this Act, the Commission . . . shall . . . prescribe such . . . conditions, *not inconsistent with law*, as may be necessary to carry out *the provisions of this Act*." 47 U.S.C. section 303(r) (emphasis added). And section 214(c) states that the Commission "may attach to the issuance of [a 214] certificate such terms and conditions as in its judgment the public convenience and necessity may require." Although this provision contains no express language limiting conditions to enforcement of the Act, it is certainly not in the public interest to adopt conditions violative of federal communications law. At a minimum, then, we cannot impose conditions under either section 303(r) or section 214(c) that contradict the Act itself.

The conditions in this Order do just that, however. Of especial legal concern are those related to carrier-to-carrier promotions.[1] These conditions limit the number of services and facilities that may be offered to competitive local exchange carriers (CLECs) on a promotional basis. Once the caps are reached, some CLECs will be unable to obtain the same promotional deals as other CLECs. Quite simply, carrier-to-carrier promotions will not be available on an equal basis to all requesting carriers. In this way, then, the conditions violate the "nondiscriminatory access" requirement of section 251(c)(3),[2] as well as the resale non-discrimination requirement of 251(c)(4)(B).[3]

Moreover, the caps directly conflict with the "pick-and-choose" provision of section 252. Section 252(i) requires incumbent LECs to "make available [to a CLEC] *any* . . . service, or network element" provided to any other CLEC "upon the same terms and conditions," regardless of the level of offering to others. For the reasons given above, the guarantee of that section will be unfulfilled as a result of the caps.[4]

Apart from the caps themselves, the underlying discounts on loop rates also offend sections 252(i) and 251(c)(3).[5] These discounts discriminate among CLECs -- in terms of prices and offerings -- by creating a situation in which a CLEC that uses an ILEC's unbundled switch gets one rate for the loop, but a CLEC that uses its own switch gets a discount on the very same loop. *Cf. American Tel. and Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214 ("[T]he policy of non-discriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that non-discriminatory policy which lies at the heart of the Communications Act.") (internal quotation omitted).

The conditions relating to the separate affiliate for the offering of advanced services are also arguably inconsistent with the Act. Those conditions are built around section 272, which requires structurally separated corporations for Bell operating companies, but only in connection with the provision of specific enumerated services. *See* 47 U.S.C. section 272 ("Separate Affiliate; Safeguards"). Advanced telecommunications services is *not* included in that list. Referring to these affiliates as section 272 affiliates, as the Order does, is thus off the statutory

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[1] *See generally* Comments of AT&T Corp. on Proposed Conditions, CC Docket No. 98-141, at pages. 15-18 & Appendix A at pages. 82-87.

[2] *See also* 47 C.F.R. section 51.313(a).

[3] *See also id.* section 51.603(a).

[4] The caps also violate the Commission's own implementation of that provision. *See* 47 C.F.R. section 51.809(a).

[5] *See also id.* sections 51.809(a), 51.313(a).

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Finally, the arbitration conditions appear to take away from the States authority expressly conferred upon them by section 252. That provision purposefully carves out a significant role for the States in the procedures for negotiation, arbitration, and approval of interconnection agreements. *See id.* section 252(a)(2)(voluntarily negotiating parties may "ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation"); *id.* section (b)(1) (negotiating parties "may petition a State commission to arbitrate any open issues"); *id.* section (d)(1)(setting standards for State commission determination of just and reasonable rates for interconnection and network elements); *id.* section (e) (State commission must approve interconnection agreements). Under section 252, the FCC becomes involved in this process *only* when a State commission fails to fulfill its duties. *Id.* section (e)(5).

This Order, however, inserts the FCC into the process of negotiating agreements to which SBC/Ameritech is a party and even specifies the terms and conditions of those agreements. For example, in the conditions regarding surrogate line sharing, the Commission actually sets rates for charges for those services. *See* Appendix A at para. 8(b). These rates are set by the FCC, not State commissions, and they are set without any of the process required by section 252. The condition regarding OSS, by which the FCC sets discounts for those services and also requires the restructuring of those charges, suffers from the same general flaws. *See id.* at paras. 18, 35; *see also id.* at para. 45 (requiring SBC/Ameritech to offer to amend interconnection agreements regarding unbundled loops), para. 47 (requiring SBC/Ameritech to offer to amend interconnection agreements regarding resale discounts). These conditions thus operate to circumscribe State involvement in the agreement process, contrary to section 252.[6]

II. The Conditions Are Disproportionate To The Alleged Potential Harms

In addition to violating the various non-discrimination directives and State commission provisions of the Communications Act, the conditions are flawed on the merits. As an initial matter, the regulatory concerns cited by the Commission lack an express statutory basis. As a result, the harms that the Order identifies are vague and, in my view, too speculative to justify the imposition of conditions on the merged entity. Even assuming those harms, however, the conditions fail to materially remedy them. In this way, the vast breadth of the conditions is unwarranted by either the record in this proceeding or economic theory.

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[6]Moreover, these conditions, by which the FCC takes over aspects of the role granted exclusively to State commissions, create great potential for confusion in the implementation of the conditions. If a rate or discount set by this Order is thought to be unjust or unreasonable, in which forum should that claim be brought? Section 252 makes State commissions the arbiters of such questions, and yet these conditions seem to impute such authority to the FCC.

A. *The Transaction Does Not Violate The Specific Terms Of Any Extant Communications Statute or Regulation*

Commission regulations take up many bookcases. For a license transfer to run afoul of a specific administrative rule therefore is not an improbable outcome. Given the breadth of our regulation in this area, it is remarkable that the Order never asserts that the transfer of licenses between SBC and Ameritech would violate any specific substantive provision of the Communications Act or any Commission regulation. Remedies for such harms, of course, would be easily and clearly prescribed: the transferee would be obliged to bring the license transfers into compliance with existing rules.

How does a regulated entity fall out of compliance, and then revert back into compliance, with a vague idea that has no written rules to define compliance or non-compliance? One must have meetings to discuss and to invent standards that did not previously exist. Indeed, the entire unsavory process of the meetings that ensued from the allegation of statutorily unfounded concerns[7] could have been avoided had the Commission's concerns been directly linked to existing written rules.

A natural but unfortunate result of regulatory "concerns" that do not derive directly from express Congressional determinations is a vague and speculative agency understanding of the harms purportedly caused by the merger. I turn to those harms below.

B. *The Alleged Harms Are Speculative And Do Not Flow From The Merger*

The Commission foresees three potential harms in the consummation of the license transfers. *See supra* at para. 5 (summarizing harms); *see also id.* at paras. 55-62 (same). *First*, that the merger will remove significant potential participants in the local exchange market within, and outside of, each company's current region. *Second*, that the merger will impair this Commission's ability to engage in comparative practice oversight and consequently extend the entrenchment of certain firms and raise the cost of regulating them. *Third*, that the merged entity will have increased incentive and ability to discriminate against competitors, and that this increased incentive and ability have particular force with respect to the provision of advanced telecommunications services.

The first harm is premised on the Commission's "precluded competitor" doctrine. According to this theory, the license transfers will result in reduced or precluded competition both inside the RBOC territories and outside the SBC/Ameritech regions. The record, however, presents no clear evidence that either SBC or Ameritech had developed plans to provide substantial in-region competition for local exchange services in the other company's territory. Whether plans that might have been developed at some future date are affected by the proposed

[7] *See infra* Part VI.

license transfers is idle speculation. Furthermore, the license transfers themselves do not limit the ability of any other company to offer local exchange services in either SBC or Ameritech territory. Consequently, it is difficult to make a compelling case that competition within either the SBC or Ameritech regions is substantially reduced or precluded by these license transfers.

As to out-of-market competition, the Order admits that there is no evidence that SBC intended to enter local exchange markets out of its regions, relying instead on "transitional market analysis." *See supra* at para. 98. This analysis appears to be little more than gussied-up speculation about what markets might look like in the absence of firm evidence. There are many equally outcomes that are equally plausible as the one reached in the Order. The theorizing in the Order may be an intriguing intellectual exercise, but it is hardly the basis for an administrative finding about the likely effects on competition out of region and thus for the resultant conditions.

The second harm is similarly conjectural. Can the Commission really defend the proposition that a reduction from six to five local exchange carriers creates a significant, material, and appreciable difference in its ability to make comparative evaluations? Or that the elimination of one company will "severely restrict," *supra* at para. 104, the behaviors that regulators can observe in the local exchange market? That is a hard case to make indeed. Currently, the FCC has no duly-promulgated rules that depend on benchmarking performance to industry levels, much less benchmarking performance to industry levels that must be derived from a minimum of six major carriers. Accordingly, this harm is based at most on the possibility that the Commission will, assuming statutory authority to do so, in the future adopt rules benchmarking performance to industry standards.

The second step in this analysis -- that the Commission's decreased ability to benchmark will therefore allow entrenched companies to remain that way for an extended period of time -- requires a leap in logic. Whatever marginal impairment there may be of the Commission's ability to benchmark, it is a far cry to conclude from that impairment that the Commission will be *so ineffective as a general matter* that entrenched companies will be more able to stay that way. Moreover, there are myriad reasons why -- apart from this Commission's regulations -- an entrenched company might be pushed into competition: for instance, the marketplace. Even if one assumes that this Commission engaged in no benchmarking at all, it simply does not follow that now-entrenched companies would have longer entrenchment periods than they otherwise would have. [8] Indeed, the Commission cannot even say how much longer, absent its diminished regulatory abilties, that entrenchment would last.

Although the Order relies heavily on the usefulness of comparative practices, the Commission's experience with benchmarking has not been entirely successful. Perhaps its most

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[8]If the Commission is truly concerned with the costs of regulation, it ought to reevaluate this Order, which creates an entire regulatory and enforcement scheme for a single company. *See infra* Part III.

significant effort at benchmarking was for purposes of cable rate regulation pursuant to the Cable Act of 1992. There, despite the presence of thousands of independent cable operators, the Commission spent a great deal of time, ran thousands of computer models, and expended countless staff resources to develop price regulations that were, in my view, clearly erroneous in terms of proper interpretation of the relevant data, economics, and the law.[9] It is not the case that benchmarking is an essential -- or even particularly effective -- tool for regulation.

The third alleged harm is based on an especially large ratio of speculation to actual likelihood. First, the Order does not demonstrate why the combined firm has any more incentive and ability to discriminate against competitors than do the separate companies. SBC is a large and powerful company in its territory, as is Ameritech. On this record, there is little compelling evidence that whatever market power either company may exercise in its region would be significantly enhanced by the license transfers. Moreover, incentives to discriminate in a market—as opposed simply to treating all customers either equally well or equally poorly for administrative, financial, legal, and regulatory convenience—depend on many technical factors of market demand and supply. Even for a single service in a narrow geographic market, it would be difficult, even with substantial empirical evidence, to conclude with certainty whether a regulatory action would increase, decrease, or leave unaltered incentives to discriminate. It is a breathtaking to conclude that the proposed license transfers at issue would have a perceptible effect on incentives to discriminate.

Yet even if there were true, I fail to see why those incentives and abilities would be particularly strong in one area of SBC/Ameritech's business, in this case, advanced telecommunication services. What is the rationale as to why that service -- as opposed to other services provided by SBC/Ameritech -- is uniquely likely to cause the company to engage discriminatory behavior? Although the Order focuses on these services, it does not rationally distinguish them from others in terms of the likelihood of discriminatory practices. *See supra* at para. 187.[10] Indeed, to the extent that SBC/Ameritech has market power generally, it is less likely to be in the market for advanced services, where there are competing alternatives, than in the market for other services where there are fewer alternatives, such as simple dial-tone service. Because the record provides little, if any, basis to even postulate that any existing market power would be enhanced by the proposed license transfers, it is difficult to understand how the subsequent conclusion about the special vulnerability of advanced services to such incentives could be justified.

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[9] *See generally* Crandall & Furchtgott-Roth, Cable TV: Regulation or Competition? (1996).

[10]In fact, the Order contradicts itself on this score, arguing that "discrimination is likely to be particularly acute with respect to the provision of local exchange services to mass market customers, for which there are few benchmarks of incumbent LECs' best practices that could be used to detect such discrimination." *Supra* at para. 196.

The final step in the Commission's chain of speculations is that, as a result of this discrimination, the Commission will be hampered in encouraging the provision of advanced services. Again, we simply do not know whether that result would come to pass due to any special incentives the combined firm would have with regard to advanced services, and there is certainly no record evidence that quantifies the impact such behavior would have on the Commission's regulatory effectiveness. To what degree would such conduct, if it actually happened, frustrate the Commission? What effect would that level of Commission frustration, in turn, actually have on the market? These are unanswerable, if not imponderable, questions. I can see nothing in the record that sheds light on them.

Moreover, all these alleged harms bear a common characteristic: the merger itself does not increase the likelihood of any of them. That is, they are things that the individual companies would be equally likely to do if the merger never took place. The merger does not in any *appreciable* way make, say, discrimination more likely or benchmarking harder than it is now. Nor are these companies, on a stand-alone basis, distinguishable from other local exchange carriers in terms of their incentives and abilities to engage in these sorts of behaviors. Even if one could quantify it, the differential in the Commission's ability now and post-merger to make such judgments is negligible in comparison to the heavy duties that have been imposed as a remedy for that purported impact.

As the Commission said in the AT&T/TCI proceeding, in response to the claim that the merged entity would engage in predatory pricing:

> [A]ny contention that the merger would create incentives to engage in [the alleged] behavior is speculative at best. As we show below, opponents may fear either of two predatory pricing strategies. Each, however, is equally available to TCI pre-merger as it is to AT&T-TCI post-merger. If the merged firm will have an ability to cross-subsidize phone service or other telecommunications services from cable revenues, then TCI already possesses that ability, and so do most cable operators. There is no need to impose a merger condition on only one cable operator among many for an alleged harm that is not traceable to the merger.

para. 117.[11] Similarly, if the combined firm can discriminate against rivals in the advanced

[11] *See also id.* at para. 23 ("[C]ommenters assert that the merger will further entrench whatever market power TCI currently enjoys in its franchise areas. To avoid or mitigate this enhanced market power, commenters ask us to adopt, for this merger, new rules regarding access to TCI's facilities, program access, and local station signal carriage. . . . [W]e decline each of these invitations to fashion new rules to confine a hypothetical increase in market power."); *id.* at para. 126 ("[T]he merger does not alter either firm's ability to engage in a profitable strategy of anticompetitive tying. Therefore, we should continue to rely on competition or, in its absence, antitrust laws to protect against this danger, just as we did before the merger."); *id.* at para. 128 (The assertion that AT&T/TCI "would have the ability and incentive to use its control over broadband transmission to the home to discriminate against competitors in downstream markets.

telecommunications market, then SBC can do that already. Just as in AT&T/TCI, it makes no sense to impose a condition on these parties, as opposed to industry-wide, when the alleged harm does not relate back to the fact of the merger.

There is no more evidence in this record that, say, discrimination in advanced services will become a reality as a result of the merger than there was in AT&T/TCI that the combined firm would cross-subsidize, tie products, discriminate downstream or engage in other anti-competitive behavior. And yet there, we declined to condition the merger based on unsupported assertions about post-merger behavior. We ought, as the Commission did in that context, to "decline to. . . condition the requested license transfer authorizations on the basis of speculation about" post-merger behavior. *Id.* at para. 122.

When it comes to the *benefits* of the merger, the Commission abruptly switches to a more exacting standard of proof and becomes concerned with merger-specificity. It finds that "[o]nly a small portion of the Applicants' claim cost-saving efficiencies. . . are merger-specific, likely and verifiable," and that "[t]he only merger-specific benefits to product markets . . . are both speculative and small." *Supra* at para. 5.[12] A scouring of this record will show, however, that applicants' evidence of their asserted benefits is no weaker than the Commission's evidence of its posited harms. It is every bit as, if not more so, founded in empirical and economic reality.

C. *The Conditions Do Not Materially Remediate The Alleged Harms*

Even if one assumes that the harms have been predicted with adequate certainty, the conditions do not really address those harms. In some instances, there is a complete lack of nexus between the posited harm and the adopted conditions, and in others the conditions will simply not remediate in any direct way the purported harm.

In the name of opening local markets, which the Commission concludes will be thwarted by this combination, the Commission mandates, among other things, the offering of unbundled network elements pending finality of the new UNE rules; arbitration of interconnection agreement disputes; shared transport; and interconnection to cable in multi-unit properties. *See supra* at paras. 377-397.

. . . depends on speculation in two respects -- first, that the merged firm will, as a result of the planned TCI plant upgrades, achieve a monopoly over broadband transmission to the home and, additionally, that 'up to a third of the nation's households' . . . will subscribe to that monopoly. On this record, we do not believe that AT&T-TCI will be successful in becoming the only firm within TCI's current territories to offer broadband transmission to the home or that, having done so, every resident in those territories will subscribe to that monopoly service.").

[12]*See also id.* at para. 257 ("We find that, of these claimed public interest benefits, few are in fact merger-specific, likely and credible.").

The UNE offering requirement, *see supra* at para. 394, bears *no* relation to the merged entity's ability to dominate local exchange markets. SBC/Ameritech's competitors face uncertainty with respect the availability of UNEs because of the litigation over that matter, not because of anything that SBC/Ameritech might do in the post-merger world. This legal uncertainty would exist whether or not these two companies ever merged, and whether or not they ever then engaged in anti-competitive behavior, and it will continue to exist until the rules become final after possible judicial review. The same is true of the requirement to provide shared transport in the face of legal uncertainty. *See id.* at para. 396.

Expediting the resolution of interconnection disputes may be generally good policy, *see id.* at para. 395, but, again, I fail to see the connection between this remedy and the harm that theoretically flows from the combination under the precluded competitor doctrine. Arbitration is often faster than litigation, but it is not clear to me that it is generally preferable from the interconnecting CLEC's point of view -- some of these companies may prefer judicial enforcement of their rights, if they have indeed been legally wronged. Had the entities combined and thereby reduced the level of competition in local markets, that would have had no effect on the resolution of interconnection agreements, a question of legal process. It is often said that reduced competition raises prices or decreases product quality, but I have never heard it asserted that reduced competition results in litigation as opposed to arbitration as a means of dispute resolution.

Likewise, the cable interconnection requirements do not really remediate any decreased competition in local exchange markets. That is, if the relevant decrease in competition is in traditional local exchange and exchange access markets, as the Commission concludes, then the condition regarding access to cable in multi-unit buildings, *see id.* at para. 397, simply does not remediate that harm. These are entirely different services.

Because the Commission believes that the combination will also preclude out-of-market competition where the companies have a cellular presence, *see id.* at para. 66, it also requires SBC/Ameritech, within 30 months of the merger, to enter 30 major markets outside of its region. *See id.* at para. 398-99. Because the Commission cannot quantify, even generally, either the decreased incentive or the effect of that decrease on the company's decisions to enter different markets, requiring entry in 30 markets is a shot in the dark: the company might have entered far more, or far less, markets in widely varying amounts of time. More importantly, however, the Commission's entry requirement is not limited to regions where they have a wireless presence -- and yet the harm it is supposed to remediate is limited to such areas. Thus, much of this condition applies to competition outside the scope of the Commission's own finding.

The Commission also requires SBC/Ameritech to offer enhanced lifeline universal service plans to low income consumers, to allow customers with unpaid bills to get reconnected with an initial payment of $25, and to set up a toll-free number for these customers. *See id.* at paras. 401-402. It is unclear to me how this requirement remedies any decrease in competition that might result from the merger. There is no evidence that these consumers would have been

served in the absence of the merger. Indeed, given their need for universal service programs, it is economically unlikely that they would have been. Nor is there any evidence that the decrease in competition, if true, would have affected the combined entity's policy with respect to late-paying customers. Therefore, the lifeline service requirements are really based on stand-alone social policy goals of the Commission's, not on any remediation of harm resulting from the merger.

Under the heading of preserving its supposedly threatened ability to regulate, the Commission requires various reporting in order to facilitate benchmarking practices. Requiring only SBC/Ameritech to make these filings does not do very much to enhance the Commission's ability to do comparative analyses. Such information, after all, is useful only in relation to data from other companies. Thus, these practices are useful only to the extent that they are required of all carriers. And they are not.

To guard against the possibility that the merged entity would discriminate against its competitors in the provision of advanced services, the Commission adopts conditions that *inter alia* require: separate affiliates for such services; 50% discounts for data CLECs on second loops; the establishment of certain advanced services operations support systems; CLEC access to loop information; the filing of cost studies on conditioning loops and a ban on certain loop conditioning charges; the roll-out of advanced services to low-income rural and urban centers.

A requirement for advanced services roll-outs to low-income *consumers* has nothing to do with the merged entity's supposed discrimination against its *competitors*. If SBC/Ameritech was discriminating against its rivals, as the Commission supposes, I fail to see how requiring the provision of services to customers in low-income areas remedies *that* injury. This remedy does not relate back to the purportedly affected parties, the combined firm's competitors. With respect to the roll-out, there is a complete disconnect between the remedy and the harm at which it is purportedly aimed. This makes the 10% roll-out quota (again, something the Communications Act does not give us authority to require outright) look more like a naked regulatory extraction than a remedy designed to address any supposed harm.

Apparently, the Commission believes that potentially harmful corporate behavior by a integrated company can be resolved through visible, separated corporate structures -- hence, the separate affiliate condition for advanced services. The public, the theory goes, would then have access to information on transparent transactions between distinct corporate entities.

Requiring separate corporate structures, even visible structures, does not, however, eliminate incentives for, and efficiencies derived from, coordination within a firm. Firms integrate precisely because there are efficiencies to be gained from integration, and often those efficiencies enhance consumer welfare. Regulation can diminish the value of integration by imposing additional costs on integrated firms, but regulation can never fully remove the incentives to coordinate without permanently severing one company from the other. If it is efficient for an integrated firm to have a certain set of internal prices for internal transactions and a certain set of external prices for external transactions, it is not obvious how any regulatory

scheme of structural separation would remove the incentive of the firm to replicate those efficient pricing schemes, at least approximately. Even non-discriminatory pricing rules with third parties may simply incent the company to establish transfer pricing policies that transfer income from one subsidiary to another, but protect some degree of coordination. Consequently, while the separate subsidiary requirement for advanced services may be well- intended to remedy a specific alleged harm of discrimination in the provisioning of advanced services, I am skeptical about the efficacy of corporate structural solutions; in my view, they do little more than provide some high-paying jobs to lawyers and accountants who deal in corporate restructuring and to raise the costs of doing business for the firm and its customers.

Finally, while the discounts to data CLECs might make it more attractive for them to enter certain markets, they cannot logically be aimed at discrimination against those companies. Assuming that it were economically rational and feasible for the combined entity to discriminate against CLECs in the provision of advanced services, that still does not explain why a 50% discount is warranted for certain CLECs. Is the presumption that the discrimination would come in the form of charging data CLECs twice as much as they charge other CLECs, hence the 50% discount requirement for those CLECs? The Commission does not appear to be advancing any such claim. Unless makes some sort of an argument like that one, however, there is again no relation back to the purported harm of discrimination against rivals in the provision of these services.

Notably, many of the parties whose intersests are supposedly protected by the conditions have taken the view that they would be better off without them. The conditions, they say, grant them less protection than that which the Communications Act already affords them, and thus may well ultimately disadvantage these parties. Thus, the supposed beneficiaries of these conditions have opposed them on the record. This curious disalignment of interests is further evidence of the lax connection between the regulatory means and the purported ends here.

In sum, the conditions, which impose heavy burdens on SBC/Ameritech, are vastly disproportionate to any real and demonstrably likely harm that would flow from the fact of the merger.[13] This is an unfortunate byproduct of regulatory concerns that are tied to the Communications Act in only the loosest of ways.

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[13]Further undermining the need for the conditions is the availability of other remedies for the harms alleged -- remedies that this Order overlooks. With particular respect to the harms of reduced competition and increased incentives to discriminate, federal and state antitrust law is fully applicable. Indeed, the SBC/Ameritech merger was reviewed extensively by the Department of Justice's Antitrust Division. Surely, yhe Antitrust Division considered these questions of competition and discrimination in the course of its extensive investigation.

III. The Conditions Impose Undue Administrative Burdens And Costs On The Commission And Participants In The Telecommunications Market

The conditions are problematic in yet another regard: by creating a set of complex rules uniquely applicable to the merged company, and that company only, the Order imposes tremendous administrative burdens on the Commission, as well as participants in the market for telecommunications services.

The Communications Act divides common carriers into specific categories. Under section 251, a telecommunications carrier can be a local exchange carrier or an incumbent local exchange carrier. Along with each classification come specific responsibilities. *See* 47 U.S.C. section 251(a)(b) ("Obligations of *All* Local Exchange Carriers)(emphasis added); *id.* section 251(c) ("Additional Obligations of Incumbent Local Exchange Carriers""). By this order, however we create a new, stand-alone category of local exchange carrier, with particularized obligations apart from those set forth in section 251, comprised of only SBC/Ameritech. Creating a fourth regulatory category of carrier under the Act is, for the following reasons, unduly costly.

A review of the appendix of conditions attached to this Order reveals the great numerosity, length, and intricacy of the conditions. That Appendix lists 30 separate conditions, each with its own subset of interpretive statements, definition, and clarifications, which take up more than 70 pages of text. To really apply and enforce these conditions, the Commission would seem to need to create a separate "SBC/Ameritech" division in the Common Carrier Bureau. Within that division would be teams responsible for overseeing the company's arbitration proceedings; auditing the company; administering the carrier-to-carrier discounts; receiving and processing the company's reports on their advanced services rollout; reviewing complaints regarding access to cable in multi-unit dwellings, *etc.* Moreover, given that this sort of regulation is entirely company-specific, the Commission would have to absorb even more staff resources for each subsequent set of merger-specific conditions it applied to other merged entities. In short, this sort of regulation is very costly to administer, a point that the Order fails to consider in its analysis of the efficiency of these conditions with respect to the Commission's future efforts to regulate.

Those who deal with SBC/Ameritech in the market for telecommunications services must also now familiarize themselves with this unique set of rules. Most players in this market have an understanding of what they are entitled to, as a matter of federal law, when dealing with CLECs. Now, however, they will need to learn (or spend money on lawyers and accountants who will figure out) what their special rights and/or duties might be when doing business with SBC/Ameritech. This places additional, and substantial, transaction costs on market participants. A set of industry-wide rules -- instead of highly complex rules for individual companies -- is much more efficient for those who do business in that industry. And each time the Commission conditions similar mergers with similarly uniquely applicable conditions, the companies will have to map those new rules as well. Pretty soon you have an entire regulatory system of

individualized duties, rather than general rules, and the inefficiency created by the SBC/Ameritech rules increases exponentially.

In and of themselves, these conditions place a substantial and direct tax on FCC resources. They also impose significant indirect costs on other participants in the telecommunications industry. And, if this regulatory model is followed in future merger reviews, the costs of such regulation will only compound.

IV. The Conditions Are Either Voluntary And Unenforceable, Or Involuntary And Judicially Reviewable

Throughout this Order, the performance of the conditions by SBC/Ameritech is referred to as "voluntary" action. *See, e.g, supra* at para. 1 (describing "proposed conditions" as "representing a set of voluntary commitments"). There are only two possible responses to this assertion. Either the conditions are therefore unenforceable as a matter of law and judicially unreviewable, or the conditions are not voluntary but government-mandated and, thus, their extra-statutory nature in fact injures the applicants and renders the conditions subject to the full panoply of judicial review.

Often, the Commission will term a standard or condition voluntary when, in point of fact, the conditions are the result of intense governmental pressure on regulated entities. The actual voluntariness of action under such conditions is often questioned, *see, e.g.,* A. Ryan, "Don't Touch that V-Chip," 87 Geo. L. J. 823, 826-831(1999) (concluding that industry adoption of television ratings was result of government coercion), and I have joined in that skepticism, *see* "Voluntary Standards Are Neither," Speech Before the Media Institute (Nov. 17, 1998) (www.fcc.gov).

If SBC/Ameritech's adherence to these conditions in the context of agency review of its transfer applications is not really a matter of choice -- for instance, if the agency intends to enforce, either directly or indirectly, the conditions -- then the conditions take on the force of law. And, as administrative law experts have observed, "even agency statements that purport to be nonbinding can have coercive effects through more subtle, less formal means. To the extent that an agency possesses significant discretionary power over a class of regulatees or beneficiaries, many are likely to "comply" "voluntarily" with an agency's "nonbinding" statement of its preferred policies." Davis & Pierce, I Administrative Law Treatise 232 (3d ed. 1994) As binding obligations, as opposed to voluntary commitments, the conditions would be judicially reviewable and subject to all the provisions of the Communications Act and the Administrative Procedures Act. And if that is true, all the legal deficiencies of the conditions described above are potentially in play.

On the other hand, if the regulations are indeed voluntary, then the company is under no binding legal obligation to perform them. The conditions would therefore be entirely symbolic, doing nothing to effectuate the Commission's purported goals.

At first blush, it might be unclear why the Commission would consciously undermine the enforceability of its own carefully crafted conditions, which it seems to believe in the public good. Characterizing the conditions as "voluntary," however, allows the Commission to achieve other strategic goals: shoring up the item against claims of lack of statutory authority and minimizing the possibility of judicial review of that authority.

As I have previously explained:

> The use of voluntary standards allows administrative agencies better to skirt statutory limits on their authority, an offense to the concept of administrative agencies in possession of only those powers delegated to them by Congress. . . . It is no coincidence that the commitments extracted from regulated entities in the guise of voluntary standards tend to be things that the agency lacks statutory authority straightforwardly to require. Voluntary standards, as opposed to duly promulgated rules, can all too easily be used to bootstrap jurisdictional issues: got jurisdiction to approve or disprove the transfer of licenses but no express statutory authority to require unbundling of the licensee's product offerings? Just make it a "optional" condition of the license transfer, add water, mix, and you have fresh jurisdiction to regulate a whole new area. The problem with this approach . . . is that it renders superfluous Congressional attempts to delineate our areas of responsibility.
>
> There is another reason that agencies might prefer voluntary standards to rules: they are harder to challenge in a court of law. Judicial review of the statutory basis for "voluntary" standards may be difficult to obtain because such guidelines, being technically non-binding, may never formally be announced or enforced against any regulatee.

"Voluntary Standards Are Neither," Speech Before the Media Institute (Nov. 17, 1998) (www.fcc.gov).

In this Order, the Commission tries to walk a tightrope between the two alternatives as to the legal status of the conditions, referring to the conditions as "voluntary commitments" but hinting elsewhere that it fully expects SBC/Ameritech to carry them out. *See, e.g., supra* at para. 4 ("*[A]ssuming the Applicants' ongoing compliance with the conditions described in this Order*, we find that the proposed transfer of licenses and lines from Ameritech to SBC serves the public interest."); *id.* at para. 360 ("We expect that SBC and Ameritech will implement each of these conditions in full, in good faith, and in a reasonable manner."). It is simply not possible to have it both ways, however: either the commitments are *de facto* standards and subject to judicial review, or they are legally unenforceable and thus meaningless as a practical matter.[14]

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[14]Equally bizarre is the reference to penalties for noncompliance with the conditions as "voluntary payments to the U.S. Treasury." *See, e.g., supra* at para. 413. More worrisome, however, is the vagueness of the actual language regarding the recipient of payments for out-of-territory violations. Such payments are to be made not to the U.S. Treasury, as are all the other

V. The Commission Lacks "Merger" Review Authority

In addition the legal problems associated with the nature of the conditions themselves, it is important to step back and recall that, as I have repeated pointed out, this Commission possesses no statutory authority to review "mergers" writ large. *See generally* Separate Statement of Harold W. Furchtgott-Roth, *In re Applications for Consent to the Transfer and Control of Licenses and Section 214 Authorization from Tele-Communications, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 98-178 (Feb. 17, 1999).

Rather, the Communications Act charges the Commission with a much narrower task: review of the proposed transfer of licenses under Title III from Ameritech to SBC, and consideration of the transfer of common carrier lines between those parties. Nothing in section 310(d) or section 214 -- the provisions pursuant to which these applications were filed -- speaks of jurisdiction to approve or disapprove the merger that has occasioned Ameritech's desire to transfer licenses and section 214 authorizations.[15]

To be sure, the transfer of the licenses and authorizations is an important part of the merger. But it is simply not the same thing. The merger is a much larger and more complicated set of events than the transfer of FCC permits. It includes, to name but a few things, the passage of legal title for many assets other than Title III licenses, corporate restructuring, stock swaps or purchases, and the consolidation of corporate headquarters and personnel. Clearly, then, asking whether the particularized transactions of license transfers and section 214 transfers would serve the public interest, convenience, and necessity entails a significantly more limited focus than contemplating the industry-wide effects of a merger between the transferee and transferor.

For instance, in considering the transfer of licenses, one might ask whether there is any reason to think that the proposed transferee would not put the relevant spectrum to efficient use or comply with applicable Commission regulations; one would not, by contrast, consider how the combination of the two companies might affect other competitors in the industry. One might also

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penalties, but "to a fund to provide telecommunications services to underserved areas, groups, or persons." Appendix A at para. 59(d). Is this meant to suggest that the payments could be directed to a group, whether public or private, politically neutral or partisan, of the FCC's choice? The language does not, on its face, prevent such inappropriate possibilities.

[15]The Commission does possess authority under the Clayton Act, which prohibits combinations in restraint of trade, to review mergers *per se*. See 15 U.S.C. section 21 (granting FCC authority to enforce Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy). If the Commission intends to exercise authority over mergers and acquisitions as such, it ought to do so pursuant to the Clayton Act, with its carefully prescribed procedures and standards of review, not the broad licensing provisions of the Communications Act.

consider the benefits of the transfer, but not of the merger generally. And one might consider the transferee's proposed use and disposition of the actual Title III licenses, but one would not venture into an examination of services provided by the transferee that do not even involve the use of those licenses.

By using sections 214 and 310 to assert jurisdiction over the entire merger of two companies that happen to be the transferee and transferor of radio licenses and international resale authorizations, the Commission greatly expands its regulatory authority under the Act.[16] Because the very premise of this Order is that it must analyze the competitive effects of the "merger," in contravention of the plain language of sections 214 and 310, I cannot sign on to its reasoning.

VI. The Order Was Adopted Pursuant To Extraordinary Procedures That Create An Appearance of Impartial Decisionmaking

The above-discussed conditions attached to this "merger" decision did not simply spring full-blown into being. They are the end result of an unusually protracted and entirely novel process for reviewing applications for consent to transfer of section 214 and 310 authorizations. In particular, these applications were reviewed in an unprecedented four-part process.

More than one year ago, SBC/Ameritech petitioned the Commission for consent to transfer licenses and authorizations to the new corporate entity. I characterize the *initial* application -- as opposed to the subsequent filing of proposed conditions, *see supra* at paras. 42-43 -- as the truly "voluntary" action in this matter. SBC and Ameritech submitted these applications of their own free will, without coercion or threat from third parties. All of these transfer requests were bundled by the Common Carrier Bureau into one public notice, and the Commission received voluminous public comments on the applications.

In accordance with both statute and precedent, the Commission could have, based on that round of public comment, which included opposition to the applications, made one of three statutorily-delineated decisions: it could have granted the license transfer and authorizations petitions; granted the license transfers subject to conditions; or, if unable to find the application consistent with the public interest, designated them for hearing. *See* 47 U.S.C. section 309(d)(2). Such outcomes allow the parties and the public to know whether, in the Commission's judgment, the public record supports the license transfer applications, or precisely what conditions would provide a basis to transfer the licenses, or exactly why the public record does not support such a finding at all.

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[16]The exercise of power not authorized in the Communications Act is not just an independent wrong: it also creates a violation of the Administrative Procedure Act. The APA requires a reviewing court to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. section 706(2)(C).

At the time, neither the Bureau nor the Commission had issued any finding relating to the sufficiency or insufficiency of the license transfer applications. Instead, the Chairman of the FCC chose a fourth and unprecedented option; he sent a public letter to the two companies suggesting that there were generalized public interest "concerns" with the applications.[17] That letter never cited a specific inconsistency between the applications and existing Commission rules or applicable statutes, nor did it cite actions that would bring the applications into compliance. Notably, had the petitions been designated for hearing under the statute, section 309 would have required "the Commission" (as opposed to the Chairman acting alone) to "specify[] *with particularity* the matters and things in issue *but not including issues or requirements phrased generally.*" *Id.* section 309(e)(emphasis added). Of course, this is exactly what the Chairman's letter did not do. *See supra* at n. 99 (summarizing Chairman's letter, consisting primarily of open-ended questions regarding general public interest concerns).

The suggestion that the companies then submitted the original set of proposed conditions as a matter of pure volition is untenable, given the fact and substance of the Chairman's letter. The "invitation," *supra* at para. 42, was an effective decree from the body with continuing regulatory power over the applicants' core business operations, and with the asserted power to prohibit the proposed merger, to come to the bargaining table.

The Order itself describes the highly unusual course of the proceedings that ensued. *See supra* at paras. 40-47 (describing Commission review procedures); *id.* ar paras. 351-53. This extraordinary process included "discussions" between the companies and Common Carrier Bureau staff unauthorized by the full Commission, with "ground rules" set by the Chairman and thus subject to change at his personal whim, several rounds of comments on the license transfers, and even special "fora" to discuss the transfers. *See also* Letter From Commissioner Furchtgott-Roth to CEOs of SBC and Ameritech in Response to Chairman's Proposed Process (Apr. 5, 1999) (www.fcc.gov) (describing concerns with process).

It is true that the *existence* of these closed-door meetings was highly publicized. But no one other than the invited attendees were privy to the deliberations, the offers and counteroffers, the issues discussed, or the regulatory "requests" and subsequent promises that transpired in them. A few parallel public meetings were held to receive comments from the public, which was unaware of the details being negotiated in the private meetings. Interested parties, both inside and outside the agency, requested attendance at the regularly scheduled private meetings, which involved government employees on government premises during regular office hours. Such requests were denied. I was provided with written minutes of the meetings, but urged not to disclose the contents, even though our *ex parte* rules might suggest otherwise.

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[17] *See* Letter from William E. Kennard to Richard C. Notebaert, Chairman & CEO, Ameritech Corp. and Edward E. Whitacre, Jr., Chairman & CEO, SBC Communications, Inc., CC Docket No. 98-141 (Apr. 1, 1999).

One can search the statute, or even Commission regulations, in vain for guidance as to how Commission staff should conduct a series of private meetings to the negotiate terms and conditions of an adjudicatory decision. If such rules were committed to paper, they might have included the following provisions (which seem to have been made up, of necessity, by Commission staff as they went along): (1) do not invite the public or any interested parties, apart from the applicants; (3) require confidentiality of all participants, asking them not to discuss the meetings with any third parties or the press; (4) keep only hand-written notes of the meetings; (5) have applicants "voluntarily" submit written conditions in order to avoid the appearance that conditions were negotiated under duress. Once a deal was struck in the private meetings between Commission staff and SBC/Ameritech, the new "voluntary" standards were then put out for a second round of notice and comment, and the "fora" discussions followed.

I am aware of no other license transfer proceeding in which these procedures have been pursued. And I seriously doubt whether we will ever adhere to this model again when seemingly similarly-situated applicants file for transfer authorization. Of course, our rules set no standard procedures for license transfers, as noted below, and so there is no rule to follow in the future.

This kind of procedural unpredictability casts a pall on the Commission's impartiality. Specifically, when the Commission subjects particular parties to a novel, extended, and unwieldy process to which it has not subjected similarly situated applicants, a reasonable person might think that the decisionmakers possessed a bias -- a bias manifesting itself in the especially high and numerous procedural hoops through which the decisionmakers were forcing the companies to jump. Unfortunately, the manipulation of procedural rules can be a cover for discrimination on the merits.

As Senator McCain put it:

> A proceeding of . . . importance and potential consequences must be attended, not only with every element of fairness, but with the very appearance of complete fairness. That is the only way its conduct will meet the basic requirement of due process. *Amos Treat and Co., Inc. v. SEC*, 306 F.2d 260 (D.C.Cir. 1962). The Commission's objectivity and impartiality are unavoidably opened to challenge by the adoption of procedures from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law a case in advance of fully hearing it. *See, e.g., Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (D.C.Cir. 1959).

Letter from Sen. John McCain to Chairman William E. Kennard, May 12, 1999.

A second problem with the processes leading up to this decision is the closed-door, private nature of the initial negotiations over the proposed conditions. As a result, the notice and comment associated with the proposed conditions did not, in my opinion, provide a meaningful opportunity for public participation. Rather, the notice and comment period opened only after a set of proposed negotiations had been privately negotiated between SBC/Ameritech and

Commission staff. And that deal was struck entirely behind closed doors. Notably, if one compares the conditions announced at the notice stage with the conditions adopted today, one will see that the final conditions are materially unchanged from those that were announced at the conclusion of the private meetings between the applicants and Commission staff. As one neutral observer noted, the conditions as revised from the public notice stage involve "*miniscule* changes to the [original] terms." Legg Mason Research Notes (Sep. 2, 1999) (emphasis added).

Notice of, and the opportunity to comment on, a proposal when the outcome has been predetermined does not fulfill the purposes of the notice and comment requirements of the Administrative Procedure Act. It also wastes the resources of the outside parties who spent time and money drafting and filing comments on the proposed conditions.

To my mind, the appearance of impartiality created by the highly erratic, unusual process in this matter, combined with the hollowness of the public's opportunity to comment on the conditions, indelibly taints the resultant Order.

VII. The Order Was Adopted Pursuant to An *Ad Hoc* and Potentially Arbitrary Review

I also have grave concerns about the standards (or lack thereof) employed in FCC merger reviews, which are exemplified by this proceeding. The Commission annually approves tens of thousands of license transfers without any scrutiny or comment, while others receive minimal review, and a few are subjected to intense regulatory scrutiny. For example, mergers of companies like Mobil and Exxon involve the transfer of a substantial number of radio licenses, many of the same kind of licenses as those at issue in this proceeding, and yet we take no Commission-level action on those transfer applications. I do not advocate extensive review of all license transfer applications, but mean only to illustrate that we apply highly disparate levels of review to applications that arise under *identical* statutory provisions.

Unfortunately, there is no established Commission standard for distinguishing between the license transfers that trigger extensive analysis by the full Commission and those that do not. Nor does this Order elucidate the standard. Yet again, the Commission adopts an order that fails to explain why this particular license transfer warrants heavy review. This is not very helpful for future applicants. Regulated entities and even their often sophisticated counsel are left to wonder: Is the question whether the merging firms are large, successful corporations? (That is one of the obvious differences between the mergers that receive heavy attention from the Commission and those that do not.) Are SBC and Ameritech somehow "bad" carriers that demand close scrutiny and heavy-handed regulatory intervention?

In short, merging parties have no clear notice as to the threshold showing for determining the scale of FCC license transfer review. Agency decisions regarding which license transfers to review, even as among license transfers occasioned by mergers, are entirely *ad hoc* and thus run a high risk of being made arbitrarily.[18]

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[18]If the answer is, as some have suggested, that the Commission reviews extensively only a subclass of license transfer applications -- those occasioned by mergers with the potential to

Nor does the Commission have any established procedures for the handling of applications for license transfers. Any particular application on any particular day could be: adopted at a Commission meeting; voted by the Commission on circulation; processed with or without a formal hearing; processed with or without so-called "public fora"; handled with or without additional private "talks" between the companies, interested parties, Commission staff, and individual, especially interested members of the Commission; granted with or without conditions; finalized after 90 days or 90 weeks, *etc.* The list goes on almost indefinitely.

Section 1.1 of the Practice and Procedure subpart of the Commission's rules, entitled "Proceedings before the Commission," does nothing to remedy the open-ended nature of Commission processes. It states that "[t]he Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time" and "[p]rocedures to be followed by the Commission shall . . . be such as in the opinion of the Commission will best serve the purposes of such proceedings." 47 C.F.R. section 1.1. This rule, written by the Commission, establishes only that the Commission can do essentially whatever it wants. There is nothing constraining or useful about this section.

Moreover, this rule -- the only general one about procedures on the Commission's books -- is routinely flouted. Section 1.1 allows "the Commission" to decide on appropriate procedures. Under the Communications Act, "the Commission" is defined as being "composed of five Commissioners appointed by the President, by and with the advice of the Senate, one of whom the President shall designate as chairman." 47 U.S.C. section 4(a). In this very proceeding, however, important procedural issues were not decided upon by the full Commission, as section 1.1. requires; rather the Chairman seems to believe that he can set procedural rules, on his own, in the form of letters to the principals of the merging companies. This is contrary, however, to the little that section 1.1 actually does require -- namely, full Commission action.

This Order reaffirms the fact that regulated entities have little basis for knowing, *ex ante*, how their applications will be treated, either procedurally or substantively. In fact, the Order goes out of its way to disclaim any precedential or guiding effect in future merger reviews, stating that the "approval of this Application subject to conditions should not be considered as an indication that future applicants always will be able to rely on similar public interest commitments to offset potential public interest harms. Each case will present different facts and circumstances." *Supra* at para. 361.

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affect the telecommunications industry -- that response is incomplete. Whatever the soundness of this theory for distinguishing among transfer applications, it is not written anywhere, whether in agency rules, regulations, policy statements, or even internal agency guidelines. While the Communications Act does allow the Commission to make reasonable classifications of applications, *see* 47 U.S.C. section 309(g), the Commission has in no way done so, much less in a way that puts the public on notice as to what those classifications are.

Of course, each of the three alleged harms from the SBC/Ameritech license transfers could be leveled against many other license transfer applications. The reduction-in-competition harm could be claimed, and supported, with equally frail records as we have today The impaired-regulator harm, based largely on speculation about future regulatory options, could equally well be leveled at any license transfer. Finally, changes in incentives to discriminate in the provision of advanced services is so speculative as to be no more or less likely for any other license transfer applications implicating such services.

The recent SBC/Comcast and Vodaphone/Airtouch transactions are but two examples of license transfers within the telecommunications industry that could have been faulted for the same harms as SBC/Ameritech. Yet these license transfers received only light review and approval without full Commission review, without months of private negotiations. There are thousands of lower profile license transfers to which the same commentary could apply. The net result is that the Commission appears to allege harms from license transfers in a selective, inconsistent, and arbitrary manner. All of these license transfers have one aspect in common: no extant rules were broken. And yet the allegation of vague and unwritten harms varies substantially, and unpredictably, among applications.

Clearly, then, the license transfer process at the Commission is lacking in any transparent, fixed and meaningful standards. A person -- even a well-trained lawyer -- who wished to prepare for this process could find scant guidance in public sources of law, such as the Code of Federal Regulations or the Commission's adjudicatory orders. Rather, one would have to be trained in the unwritten ways of this Commission to know what to expect, and those expectations unfortunately would have little relation to federal administrative law.

While obviously troublesome on an intuitive level, such a license transfer process suffers from at least four particular flaws under the Administrative Procedure Act. *First*, the wholly *ad hoc* nature of this process makes it all too easy for decisionmakers to discriminate among industries and even companies – in other words, to engage in arbitrary and capricious review. Protecting against such decisionsmaking is, of course, a core function of the Administrative Procedure Act. *See* 5 U.S.C. section 706(2)(A) (reviewing court must "'aside agency action . . . found to be arbitrary [and] capricious").

Second, and relatedly, by failing to state clearly the principles that it uses to judge license transfers, the Commission decreases the viability of meaningful judicial review. The net result is to undermine the statutory right of aggrieved parties to judicial review. *See id.* section 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). That right of review is an interested party's primary defense against arbitrary agency decisions.

Third, the nonascertainable nature of the license transfer process means that interested parties have no fair notice as to the regulatory constraints on their conduct. Notice of what the law requires -- *i.e.*, which behavior is prohibited and which is permissible -- is a bedrock element

of fairness in our legal system, derivative of the Due Process Clause. No person should be penalized for violating a rule that is either so vague as to give no clear indication of the prescribed conduct, or entirely unpublished and thus unavailable to the public, residing only in the minds of regulators. The notice and comment procedures of the APA are designed to safeguard against lack of fair notice. They require notification, and an opportunity to participate in the making, of the standards that govern interested parties. *See id.* section 553(b)-(c). Indeed, the whole rulemaking system of the APA is based on the assumption that governing standards will be published and public *before* they go into effect, allowing regulated parties a certain amount of time to conform their conduct to the new federal standards. *See id.* section 553(d) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date. . . .").

VIII. The Order Fails To Articulate Intelligible Principles To Cabin The "Public Interest" Test For Mergers

The statutory test to be applied to license transfers is, of course, the "public interest" standard. The Commission has failed to place any outer limits whatsoever on this concept, freely reinterpreting the standard in each new high-profile license transfer review. Not only does the Commission's lack of clear guidelines with respect to standards governing license applications present issues of arbitrary decisionmaking and of fair notice, as discussed above, it may also create constitutional issues with respect to the non-delegation doctrine.

Earlier this year, the United States Court of Appeals for the D.C. Circuit ruled in *American Trucking Ass'n v. EPA*, 1999 WL300618 (May 14, 1999) that the EPA's failure to adopt "intelligible principles" the guide its implementation of the Clean Air Act effected an unconstitutional delegation of legislative power. The Court explained that "[w]here . . . statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its town." *Id.* at *6. According to this case and its precedential forebears, *see International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), this agency has a constitutional duty to choose interpretations of statutory language that avoid, rather than create, non-delegation doctrine problems.

I believe that the FCC has not satisfied its obligation under *American Trucking* to adopt "determinate, binding standards," 1999 WL 300618 at *6, in order to channel its discretion under the "public interest" provisions of sections 309 and 214. Putting aside the question of the breadth of the statutory standard itself, the Commission has not articulated any clear, binding principles about what that standard means in the context of merger review; how it applies to different entities; and what justifies a departure from standard practice, to name just a few of the major outposts on the license transfer trail.

In short, there are no self-defined limits -- at either end of the spectrum -- on the issues

that the Commission seems to believe that it can consider in deciding whether to grant or deny a license transfer when mergers are involved; in each "merger review" order, we see a new set of regulatory goals and conditions. Is there anything that the Commission *couldn't* do under the public interest standard when considering applications under section 310 and 214? Not as far as I can tell from this Order. This is arguably the kind of "free-wheeling authority [that] might well violate the nondelegation doctrine." *International Union, UAW v. OSHA*, 938 F.3d at 371.

I have always thought that it was incumbent on the Commission to fashion some guidelines to place limits on its discretion as a matter of simple fairness. Under *American Trucking* and *International Union,* it would appear that the Commission also has a *constitutional* duty to do so. It has not even attempted to carry out this duty.

IX. Conclusion

Today's Order, and the process that led up to it, exemplify my concerns with this Commission's review of license transfer applications that happen to be filed by merging entities. The Commission: imposes conditions that lack an express statutory foundation -- indeed, that affirmatively violate specific and fundamental statutory directives; foresees harms so vague and speculative that the actual nexus between those harms and the remedies imposed is difficult to ascertain; promulgates costly company-specific regulations; requires conduct by companies that it could not require outright in a rulemaking; creates new processing schemes to suit its fancy in individual transfer proceedings, raising questions about the neutrality of its decisionmaking; lacks any clear substantive standards for merger review, which creates problems of fair notice, increases the potential for arbitrary decisionmaking, and implicates the non-delegation doctrine.

Because these license transfer applications meet the requirements of extant statutory and regulatory rules, I would simply have granted them unconditionally, pursuant to traditional notice and comment procedures, without subjecting the applicants to an extra-statutory and most troubling process.